

BUYING AND SELLING A HOUSE

GENERAL COMMENT

Buying or selling a house is often the single largest financial investment you will make. A mistake here can undo a lifetime of effort. This outline gives you an idea of the problems that can happen. The help of a lawyer who represents YOU is important.

Buying or selling a house does not have to be complicated and/or overwhelming, especially if you have a legal professional on your side, looking out for your interests. Ensuring the peace of mind that comes with an attorney's services is every bit as valuable to a homeowner as locking in the best possible interest rate.

Many details that buyers and sellers do not see as problems could jeopardize your peace of mind and your wallet. Ideally, you should consult with a lawyer as soon as you know you are going to buy a house or put your house up for sale — even before you call in a real estate broker.

For the seller, the most beneficial of these agreements are the Exclusive Agency and the Open, or nonexclusive. Please be aware of what type of an agreement is made.

If the seller has already received indications of interest from prospective buyers prior to engaging a broker, the seller should exclude these potential buyers from the listing agreement or set a reduced commission in the event of a sale to one of the excluded buyers.

Broker's duties to the buyer:

■ Although there is no formal contractual arrangement with the broker, the courts may impose on the broker certain fiduciary obligations toward the buyer.

NOTE: Massachusetts has no duty to disclose under Common Law. The broker's seller disclosure form is not a substitute for a professional inspection of the property.

Buyer's duties to broker:

■ Unlike sellers, buyers are generally not limited to one broker; they may contact and deal with several brokers. There is usually no oral or written agreement between the buyer and the broker.

■ "When a prospective buyer solicits a broker to find or to show him property which he might be interested in buying, and the broker finds property satisfactory to him which the owner agrees to sell at the price offered, and the buyer knows the broker will earn a commission for the sale from the owner, the law will imply a promise on the part of the buyer to complete the transaction with the owner." — *Ellsworth Dobbs*, 236 A.2d at 859.

THE OFFER TO PURCHASE AND PURCHASE & SALE AGREEMENT

Hire your lawyer before you sign any Offer to Purchase, Purchase & Sale Agreement or any other related contract.

An Offer to Purchase is a preliminary agreement, secured by the payment of earnest money (deposit paid to the seller to impress that the buyer "earnestly" intends to purchase the property), between a buyer and seller as an offer to purchase real estate. An Offer to Purchase secures the right to purchase real estate upon agreed terms for a limited period of time. If the buyer changes his mind or is unable to purchase, the earnest money is forfeited unless the Offer to Purchase expressly provides that it is to be refunded.

In most residential transactions, it is assumed that the Offer to Purchase will be followed, within 10 days, by a Purchase & Sale Agreement.

A Purchase & Sale Agreement is a contract in which a seller agrees to sell and a buyer agrees to buy, under certain specific terms and conditions spelled out in writing and signed by both parties.

Although an Offer to Purchase and Purchase & Sale Agreement are frequently represented as "standard" or "forms," they are not. Each one is a binding contract between a buyer and seller. While the rights and duties created by the Offer to Purchase may be changed or defined in the Purchase & Sale Agreement, *the Offer to Purchase is binding even without a Purchase & Sale Agreement*. There is no one "standard" form for an Offer to Purchase or Purchase & Sale Agreement used in all deals. There are dozens of so-called "standard" forms. Each has requirements that may help or hurt either party.

Among the matters that should be defined as a part of the Offer to Purchase are:

- The address of the property offered for sale;
- The type of property — single family, multi-family, etc.;
- The purchase price of the property for sale;
- Agreed costs for payment of purchase price;
 - the total amount earnest money paid to seller;
 - the total deposit to be due upon contract execution; and
 - the total balance due at the closing;
- The closing date;
- Inspection contingencies;
- Mortgage contingencies; and
- Any other conditions/contingencies, i.e., appliances to be included, fixtures to be excluded, removal of tenants, review of condominium documents, replacement of septic system.

Among the matters that should be negotiated as part of the Purchase & Sale Agreement are:

- Refund of deposit to buyer if the buyer cannot get a mortgage;
- Seller's guarantee to pay the broker's commission even though the buyer defaults and there is no sale;
- Buyer's obligation to purchase the house even if it is totally destroyed;
- Seller's obligation to empty the house completely before passing papers;
- Seller's right to sue buyer for damages if buyer defaults in addition to retaining the deposit; and
- Buyer's right to have various inspections done, including a structural inspection, pest inspection, lead paint and water, UFFI, radon and Title 5 issues.

NOTE: Completion of inspections prior to execution of the Purchase & Sale Agreement is recommended.

Obviously, some of these provisions are necessary in certain situations. Since it is basically impossible for a lawyer to protect a client when the client has already signed away his rights in a poorly drawn or harmful agreement, the only way to be fully protected is to have your lawyer review the Offer to Purchase

and the Purchase & Sale Agreement — or any other contract — **before** you sign it.

YOUR LAWYER'S ROLE

A buyer should have his or her own lawyer. Lawyers are indispensable to any problem-free real estate sale. Depending on what representation the usual parties (seller, buyer, banks) choose and how they elect to share the responsibilities, the lawyer's functions are critical.

Frequently homebuyers believe the bank's lawyer is also their lawyer. Although the buyer is obligated to pay for the bank's lawyer, this payment does not mean the lawyer is representing the homebuyer. The lawyer representing the bank has the primary job of making sure the bank's rights are protected. In some ways, what the bank wants (good title, etc.) is the same as what the buyer wants. A buyer, however, has interests beyond the bank's and different from the bank's. After all, the buyer and bank stand on opposite sides of a set of contracts, contracts that generally will be the most important financial obligation the buyer will ever make.

In a traditional sale, lawyers handle these functions:

Lawyer for Seller:

1. Consult with client;
2. Review or prepare Purchase & Sale Agreement and negotiate its terms, including who will hold the deposit;
3. Prepare deed and, if necessary, a power of attorney;
4. Deal with title issues raised by the bank's lawyer;
5. Attend closing and review papers the seller is asked to sign;
6. Handle escrows and special arrangements to correct title, complete construction or assure possession;
7. Transfer of security deposits and notices to tenants;
8. Get account numbers/phone numbers for existing lien holders; and
9. Arrange for 6d Certificates/Insurance Certificates/Release of Right of First Refusal (if any) if condominium.

Lawyer for Buyer:

1. Consult with client, including issues on how to take title, information on type of property to be purchased (i.e., single family, multi-family) and financing issues;
2. Review offer to purchase;
3. Review or prepare Purchase & Sale Agreement and negotiate its terms, including who will hold the deposit;
4. Advise on financing and tailoring of purchase and sales terms to lender's requirements;
5. Review the inspection reports noted above;
6. Review title examination with bank's lawyer;
7. Attend closing and review papers the buyer is asked to sign;

LISTING AGREEMENT BETWEEN SELLER AND BROKER:

There are four basic types of broker listing agreements:

1. *Exclusive Right To Sell* — This arrangement gives the broker the right to collect the commission if the property is sold to anyone during the period of the contract, even if the sale is to a buyer that the owner found without the broker's help.
2. *Exclusive Agency* — This entitles the broker to a commission, or a share of the commission, if the property is sold by her efforts or the efforts of any other broker, but not if the property is sold by the owner.
3. *Open, or nonexclusive* — The broker is entitled to a commission only if she is the first person to procure a buyer who is ready, willing and able to buy. If anyone else, including the seller, finds a buyer first, the broker gets no commission.
4. *Net listing* — Under this arrangement, the seller agrees to accept a set price for the property, and the broker keeps any amount over the price.

8. Set up escrows and special arrangements to correct title, complete construction or assure possession;
9. Arrange title insurance protection for buyer against losses due to title defects, if cash transaction;
10. Transfer security deposits and notices to tenants; and
11. Discuss and prepare a declaration of homestead.

Lawyer for Bank:

1. Order and review examination of title (see below);
2. Order and review plot plan;
3. Order and review municipal lien certificate;
4. Provide note, mortgage and other loan papers;
5. Prepare for the closing, provide estimated closing costs to parties;
6. Preside at closing, confirm receipt of good funds prior to recording;
7. Record documents;
8. Pay off existing mortgage and liens and obtain discharges or releases;
9. Set up escrows and special arrangement to correct title, complete construction or assure possession;
10. Prepare mandatory reports to IRS;
11. Record all documents properly; and
12. Certify title to buyer and lender and prepare title insurance policies.

EXAMINATION OF TITLE

After the Purchase & Sale Agreement has been signed and financing is arranged, a full title examination must be done on behalf of the buyer and the lender, if any. The search must cover at least 50 years since many rights and obligations involving real estate continue for long periods of time. Some problems that may affect the title are:

- Mortgages;
- Taxes;
- Mechanics' liens;
- Debts of decedents;
- Estate taxes;
- Restriction on use, including zoning and conservation issues;
- Bankruptcy;
- Estate and federal laws;
- Foreclosures;
- Divorces;
- Attachments and judgments; and
- Rights of others to use the property, including any shared access rights or easements.

Title examination requires understanding all the deeds, mortgages, court decrees and other documents affecting the

title, considering the time sequence of transactions and events affecting the title, and applying the law, title standards and court decisions to the facts found in the title examination. Since the cost of correcting title defects is the seller's obligation, it is important that the title examination be completed and the seller's attorney be notified in sufficient time to be able to correct the title defects before the closing date.

PASSING PAPERS AND SETTLEMENT COSTS

The closing must follow the exact provisions of the Purchase & Sale Agreement. The lawyers compute the adjustments for taxes, fuel, etc., and prepare a closing statement showing the amount owed by buyer to seller. The deed, mortgage and other documents are inspected for accuracy and signatures. Both buyer and seller sign agreements to reimburse buyer's bank for losses in connection with smoke detectors, lead paint and other substances.

Seller's normal expenses include:

- Lawyer fee, including negotiations, drafting documents, correction of title defect, removal of liens, etc.;
- Massachusetts deed excise stamps;
- Recording costs of mortgage discharges and other title clearing documents;
- Mortgage payoffs;
- Real estate taxes to date;
- Water and sewer charges; and
- Real estate broker's commission.

Buyer's normal expenses include:

- Lawyer fee, including negotiations, drafting documents;
- Cost of the title examination;
- Cost of preparing mortgage documents, including bank lawyer's fees;
- Recording charge for deed, mortgage and municipal lien certificate;
- Homeowner's insurance premium (one year);
- Escrows for taxes and insurance;
- Fuel oil in tank;
- Interest from closing date to first of month; and
- Miscellaneous expenses, such as certificate of municipal liens, plot plan, title insurance, bank application fee, points and other finance charges, if any of these are required.

TITLE INSURANCE

The vast majority of lenders require a lender's title insurance policy be procured at the closing. This policy is part of the costs paid by the buyer but the policy does not insure the buyer. At the same time the buyer may elect to purchase an owner's title insurance policy, which will protect his or her equity interest for an additional one-time premium.

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Legal assistance is available through the Massachusetts Bar Association services listed below.

■ Dial-A-Lawyer

Call and speak to an attorney, free of charge, on the first Wednesday of every month.
5:30–7:30 p.m. (617) 338-0610

■ Lawyer Referral Service

Open Monday through Friday, from 9 a.m. to 4:45 p.m., the Lawyer Referral Service helps solve legal problems by referring callers to lawyers or appropriate agencies. The LRS does not offer legal advice. There is no charge to use the service. To contact the LRS, call:

Boston area: (617) 654-0400
Toll-free: (866) MASS LRS (866) 627-7577
TTY: (617) 338-0585
E-mail: LRS@massbar.org
Web site: MassLawHelp.com

■ Legal Fee Arbitration Board

When your attorney's fee is in dispute, call:

Statewide: (617) 338-0552
E-mail: FAB@massbar.org
Web site: www.MassBar.org/LawHelp

■ MassLawHelp.com

Free legal information and online referrals to attorneys is available on the Massachusetts Bar Association's Web site at www.MassLawHelp.com.

■ Speakers Bureau

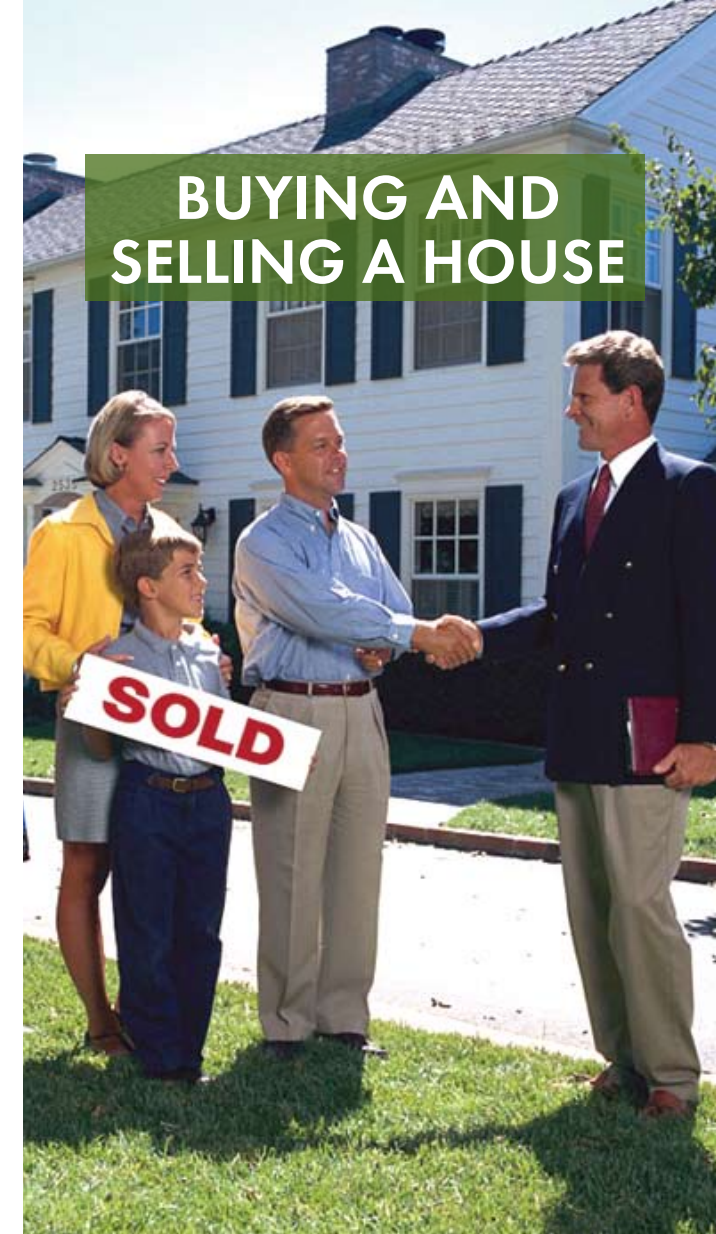
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